

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SUBSTANTIAL
DEVELOPMENT PERMIT ISSUED BY THE
CITY OF SEATTLE TO DAVID B. HURLBUT

PORTAGE BAY-ROANOKE PARK COMMUNITY
COUNCIL; LARRY and PEARL POITRAS;
JOHN and JEAN LAUGHLIN; FRED and
MARTHA WATSON; EDGAR and ANN NEAL;
RICHARD and FRANCES LOFGREN; GARY
OMAN; DAN and EUNICE PORTE, and
DAVID B. HURLBUT,

Appellants,

v.

CITY OF SEATTLE,

Respondent.

SHB Nos. 194 and 194-A

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

These consolidated matters, requests for review of a substantial development permit with conditions, issued to David B. Hurlbut for the construction of a floating walk and service facilities for six houseboats came on regularly for hearing in Seattle, Washington on December 22, 23, 1975, January 13, 14, 1976, and January 26, 1976.

1 A sixth day of hearing was held in Seattle on February 2, 1976 and a
2 seventh day in Lacey, Washington on February 10, 1976. Members of the
3 Board participating in this matter were Walt Woodward, seven days,
4 Ralph A. Beswick, seven days, Robert E. Beaty, seven days, Gordon Y.
5 Ericksen, five days, Chris Smith, five days, and W. A. Gissberg, one
6 day. Ellen D. Peterson, hearing officer, presided. Mr. Roger Leed
7 appeared for the Community Appellants, (as captioned); Ms. Mary Ellen
8 Hanley represented Appellant David B. Hurlbut; Mr. Charles Brown,
9 Assistant Corporation Counsel, appeared for the City of Seattle.

10 Having either heard or considered the testimony, having examined
11 the exhibits, having reviewed the contentions and post hearing briefs
12 submitted by all parties, and the Board having received exceptions to
13 its proposed Order, said exceptions being granted in part and denied
14 in part, the Shorelines Hearings Board makes the following

15 FINDINGS OF FACT

16 I

17 On May 21, 1973, Dr. David B. Hurlbut applied for a substantial
18 development permit to construct a floating walk and service
19 facilities for 12 floating homes and dryland parking for 12 cars.
20 On July 7, 1975, a substantial development permit was issued by
21 the City of Seattle to Dr. Hurlbut for the proposed project with two
22 conditions imposed: "(1) that the number of houseboats be reduced to
23 six, (2) that the total development extend no more than 350 feet
24 northeast and normal to the centerline of vacated Fuhrman Avenue."

25 Community Appellants timely appealed the issuance of the permit
26 on August 1, 1975. On August 7, 1975 Appellant Hurlbut requested

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1 review of the special conditions imposed on the permit and timely cross-
2 appealed from the Community Appellants' Request for Review.

3 II

4 The project is sited at 2700 Boyer Avenue East, Seattle, Washington
5 on the southwest shore of Portage Bay. Appellant's property includes
6 two submerged lots (Lots 6 and 6A of Blocks 11 and 11A) approximately
7 486 feet in length and 60 feet wide, zoned Residence Waterfront (RW),
8 and a third lot with a total of over 14,500 square feet, 9,000 square
9 feet of which are submerged. This lot (Lot 7, Block B) is zoned
10 Residence Single Family 5000 (RS 5000).

11 At present, Appellant Hurlbut's construction on the site consists
12 of three covered boathouses extending 40 feet over the water and a
3 120 foot long dock used for commercial boat moorage.

14 III

15 The project, as designed for 12 floating homes, would eliminate
16 existing construction and include: (1) a six foot wide, 486 foot long
17 floating concrete walkway with appurtenant utility pipes and cables,
18 (2) 12 attached houseboat floats, each with a three foot draft and a
19 maximum area of 1,200 square feet separated from each other by a minimum
20 of 15 feet, (3) on a dogleg from the walkway, a floating dock six
21 feet wide and 274 feet in length connecting the floating homes with
22 the shore and intended for use as boat moorage, (4) a parking lot for
23 12 cars on the dryland portion of the site, (5) a landscaped area
24 of approximately 1,500 square feet north of the parking area and
25 adjacent to the water, and (6) the paving of the Edgar Street end, 20
26 feet wide, to provide access to the parking lot and shoreline.

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1 Under the conditions imposed by the permit, the concrete walkway
2 would be reduced by 136 feet and the number of houseboat floats which
3 can be attached to such walkway is reduced to six.

4 IV

5 The floating home moorages of the project are to be placed within
6 an open water area described throughout the hearing as a cul-de-sac.
7 This discrete body of water is bounded on the north by the 12 Portage-at-
8 Bay or Dock Society houseboats, on the south by the Queen City Yacht
9 Club moorage, on the west by the shoreline between East Hamlin Street
10 and East Edgar Street and on the east by the Pierhead/Construction
11 Limit/Harbor line.

12 The present surface area of waters in the cul-de-sac is
13 approximately six acres. Construction of the project as applied for
14 (12 houseboats) would reduce such surface waters by approximately one-
15 half acre; the modified permit would reduce the surface waters by
16 approximately one-quarter acre.

17 The width of the opening to the cul-de-sac, i.e., the distance
18 between the last houseboat bayward at the Dock Society and the end of
19 the northernmost Queen City Yacht Club pier is approximately 325 feet.
20 Moorage for 12 houseboats would leave a width of 170 feet between the
21 end of the Dock Society and the project's terminus and 91 feet between
22 this point and the aforesaid Queen City Yacht pier. The modified six
23 houseboat moorage would result in approximate diagonal widths of 210
24 and 145 feet respectively.

25 V

26 The Final Environmental Impact Statement (FEIS) prepared for the
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1 proposed project describes its general area as one of mixed use, including
2 the Roanoke Connector (Highway SR 520), yacht clubs, floating homes, and
3 single family residences. Testimony, exhibits, and an on-site visit
4 by Board members supports the FEIS characterization. The construction
5 of either six or 12 houseboats is a permitted use within the RW zone and
6 would be compatible with uses now existing in the neighborhood. The
7 proposed parking lot, however, while required by ordinance to be
8 provided for such houseboats, is a conditional use within the RS 5000
9 zone.

10 The total area of the two submerged lots is approximately 30,000
11 square feet resulting in 2,500 square feet per residence if 12 houseboats
12 are constructed or 5,000 square feet per residence if six houseboats are
13 constructed. If only usable lot size under permit condition number two
14 is considered, 3,500 square feet per residence would be available for the
15 construction of six houseboats.¹ While the RW zone requirements (2,000
16 sq. ft. per lot) are thereby met, the project would somewhat intensify
17 the density of the neighborhood immediately west of the project which,
18 in general, meets its applicable RS 5000 (a minimum of 5,000 sq. ft. per
19 lot) requisite.

20 Testimony was inconclusive that additional houseboats in the
21 neighborhood would have a negative effect on property values.

22

23

24 1. Note that if the total area of the three lots (44,856 sq.
25 ft.) is considered in assessing density, a density of 3,738
26 square feet per residence for 12 houseboats and a density
of 7,476 square feet per residence for six houseboats would
result.

1 VI

2 Conflicting testimony was received regarding the extent of view
3 blockage which would result from the construction of either six or 12
4 houseboats. It is clear that, in varying degrees depending upon the
5 angle and elevation of the vantage, the existence of the houseboats will
6 both cover now visible open waters and affect the upland view of the
7 open waters of Portage Bay.

8 The Board, however, finds no merit in Community Appellants' claim
9 of "view intrusion" created by the existence of houseboats per se.
10 While diverse opinions are held regarding the esthetics of houseboats,
11 the Board finds that, absent a refined master program which might
12 address such consideration, the Shoreline Management Act cannot be
13 read to preclude floating homes on esthetic grounds.

14 The Board further finds that floating homes have historically
15 been a part of the Seattle waterfront.

16 VII

17 Extensive testimony was heard on the projected impact of the
18 project on the recreational use made of the waters of the cul-
19 de-sac primarily by residents of the neighborhood.

20 These uses now include motorboating, sailing, windsurfing, swimming,
21 sculling, canoeing, kayaking, rowing, fishing, and innertubing as well
22 as maneuvering and/or rafting of boats for Seattle's Opening Day and
23 Christmas Parades.

24 It is uncontroverted that with the construction of six or 12 house-
25 boats there would be less surface waters available for all such

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1 activities. It can also be anticipated that the narrowing of the
2 entrance to the cul-de-sac could well deter larger vessels with
3 inexperienced skippers from maneuvering therein. However, if habitation
4 of the houseboats is calculated, the impact of the project on the
5 intensity of water activities in the cul-de-sac must be largely
6 speculative and cannot be quantified.

7 VIII

8 The FEIS concludes that no species of birds, either migratory
9 or resident, are dependent upon Portage Bay or its environs for survival.
10 Relative testimony was not persuasive that the project would have a
11 significantly adverse effect on shorebirds or waterfowl. No challenge
12 was made that the project, whether of six or 12 houseboats, would have
13 any significant adverse effect on vegetation, fish, air, or water quality.

14 IX

15 At present, public access to the shoreline of the site is effected
16 through (a) the Queen City Yacht Club parking lot, (b) descending an old
17 stairway on the north of Appellant's property, or (c) approaching over
18 the uncleared relatively steep Edgar Street end. Both (a) and (b) are
19 in effect tolerated trespasses. A request to the City from the
20 Community Appellants to convert the Edgar Street street end into a mini-
21 park and to improve the street's access to the shoreline is pending.

22 The instant project purports to provide public access to the shore-
23 line through its grading and paving of the Edgar Street end, the creation
24 of the landscaped area (III-5) and public use of the boat moorage dock
25 (III-3).

26 To date, Appellant Hurlbut, concerned with liability consequences,

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1 has executed no easement or other legal agreement assuring such public
2 access.

3 X

4 Appellant Hurlbut purchased the subject properties in 1968 for
5 \$40,500. He estimates a present market value of Lot 7 as \$50,000.
6 The assessed valuation of the two submerged lots for tax purposes is
7 approximately \$60,000. Appellant Hurlbut calculates his present annual
8 return on the commercial moorage as 6 percent gross and 1.5 percent net.

9 Conflicting, confusing, and ultimately inadequate testimony was
10 offered regarding projected costs and rates of returns resulting from
11 the construction of six or 12 houseboats and no reliable finding in this
12 regard can be made.

13 XI

14 On the date the application for the project was filed, May 21, 1973,
15 Seattle had no draft master program. Draft Four of Seattle's Master
16 Program which existed in published form when the permit for the project
17 was issued on July 7, 1975 designated the subject site as an Urban
18 Stable environment and deemed floating homes within such environment
19 a conditional use. However, subsequent to the publication of Draft
20 Four and prior to July 7, 1975, the Seattle City Council voted that
21 floating homes in the Portage Bay area be a permitted, rather than a
22 conditional use. Draft Five of the Seattle Master Program, published
23 in November, 1975, continued to designate floating homes in the Portage
24 Bay area as a permitted use. By the time this matter came to hearing
25 in late December, 1975, the City Council had once again reversed its
26 designations. The Portage Bay area was to be within the Urban

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1 Residential environment and floating homes in Portage Bay were to be
2 a conditional use. The final master plan adopted by the City Council
3 on March 29, 1976 designated floating homes in the Portage Bay area as
4 a permitted use although subsequent correspondence from Councilman
5 Miller informed the Board that this was a drafting error and the use is
6 in fact conditional.

7 XII

8 Any Conclusion of Law hereinafter recited which should be deemed
9 a Finding of Fact is hereby adopted as such.

10 From these Findings the Shorelines Hearings Board comes to these

11 CONCLUSIONS OF LAW

12 I

13 Pursuant to RCW 90.58.140(2)(a), standards which the Board is to
14 apply in reviewing a substantial development permit are (a) the policy
15 of the Shoreline Management Act, RCW 90.58.020, (b) the guidelines and
16 regulations promulgated pursuant thereto by the Department of Ecology,
17 WAC 173-16, and (c) "so far as can be ascertained, the master program
18 being developed for the area."

19 II

20 The project's consistency with the Department of Ecology guidelines
21 was not raised as an issue by Community Appellants prior to or during
22 the hearing on the merits and cannot be argued at this time.

23 Further, the Department of Ecology guideline specifically addressing
24 floating homes, when read by the Board in aid of its interpretation of
25 the Shoreline Management Act, is not supportive of a ruling prohibiting
26 the instant project. WAC 173-16-060(8)(e) provides:

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1 Floating homes are to be located as moorage slips approved in
2 accordance with the guidelines dealing with marinas, piers,
3 and docks. In planning for floating homes, local governments
4 should ensure that waste disposal practices meet local and
5 state health regulations, that the homes are not located over
6 highly productive fish food areas, and that the homes are
7 located to be compatible with the intent of the designated
8 environments.

9 III

10 Considering the uncertainty expressed by the City of Seattle
11 with regard to the most desirable treatment of floating homes under its
12 master program as documented in Finding of Fact XI, the Board concludes
13 that, with regard to a use or environment designation for floating homes,
14 no ascertainable master program existed for the City of Seattle at the
15 time the permit was issued. Any attempt to either establish or limit
16 property rights on the basis of decision making which has been
17 demonstrably subject to such uncertainties would prompt serious
18 constitutional concerns. Thus, the Board must rely in its review on the
19 policies of the SMA enunciated in RCW 90.58.020.

20 IV

21 The recreational activities described in Finding of Fact VII are
22 incidental to or corollary to the public's rights of navigation. However,
23 no such traditional rights of navigation exist within designated
24 harbor lines.² The SMA does require a recognition of the public's rights
25 in navigable waters, but it does not mandate the creation of such rights
26

27 2. See Harris v. Hylebos Indus., Inc., 81 Wn.2d 770, 505 P.2d 457
(1973), Wilbour v. Gallagher, 77 Wn.2d 306; 462 P.2d 232, 239
(1969), Nelson, "State Designation of Submerged Lands Versus
Public Rights in Navigable Waters" 3 Nat. Res. Lyr. 491 (1970).

1 where none formerly existed.

2 It should be noted that even if such rights of navigation were
3 found to exist, the projected impediment to existing recreational uses,
4 particularly when weighed against the intensification of certain water
5 activities by houseboat occupants, is not prohibitive of the project.

6 Although the project's location within a construction and
7 harbor line obviates a recognition of rights of navigation, the project
8 nonetheless must otherwise conform to the policies of the SMA.

9 V

10 The Board concludes that the construction of six or 12 floating
11 homes is a water-dependent use. The providing of the minimum number of
12 parking spaces required by ordinance for such floating homes is a
13 necessary accessory to such use.

14 VI

15 The Board further concludes that Community Appellants failed to
16 meet their burden that the impact of the project on fauna, density or
17 view obscuration rendered either the six or the 12 houseboat proposal an
18 unreasonable or inappropriate use. The Board, however, is concerned
19 that public access to the shoreline of the site is not sufficiently
20 fostered or assured under the project to satisfy compliance with the
21 SMA.

22 VII

23 Additionally, the Board acknowledges that open waters are a valuable
24 natural resource which must be protected and preserved and that a
25 balancing of such preservation with private property rights must be
26 made. In terms of the extension of the project into the open waters,

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1 the Board finds no basis for reversing the judgment reflecting such a
2 balance made by the City of Seattle in limiting the project to 350 feet
3 into the open waters.

4 There is, however, no supportable basis for the additional
5 condition that the number of houseboat floats be reduced to six.
6 Applying the project's proposed and conforming density for 12 houseboats,
7 i.e., 2,500 square feet per residence to the submerged lots as
8 restricted herein would permit the construction of eight floats.

9 VIII

10 Any Finding of Fact which should be deemed a Conclusion of Law
11 is hereby adopted as such.

12 Therefore, the Shorelines Hearings Board issues this
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ORDER

The shoreline development permit issued by the City of Seattle to Appellant Hurlbut is affirmed subject to the following conditions:

1. Special condition number two of the permit is retained.
2. Special condition number one is vacated; in substitution thereof the number of houseboat floats shall not exceed eight.
3. Appellant shall execute an easement or other legal agreement ensuring public access to and use of the landscaped area.

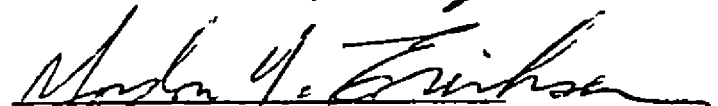
This matter is remanded to the City of Seattle for further processing consistent with this decision.

DATED this 28th day of May, 1976.

SHORELINES HEARINGS BOARD


WALT WOODWARD, Member


ROBERT E. BEATY, Member


GORDON Y. ERICKSEN, Member


RALPH A. BESWICK, Member

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